93 -No. 532

Supreme Court, U.S.
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IN THE

# *Supreme Court of the United States*

OCTOBER TERM, 1993

JAMES REYER

*Petitioner,*

V.

WILLIAM G. TODD ET AL.

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JAMES REYER, ESQUIRE
Post Office Box 5876
Santa Rosa, California 95402
(707) 576-1244

*Counsel for Petitioner*

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## QUESTIONS PRESENTED

1. Whether the filing of a timely notice of appeal of a pre-trial collateral order ousts the district court from jurisdiction over the subject matter of the appealed order and invests the court of appeals with jurisdiction over the subject matter of the order while the question is pending whether the order being appealed is appealable?

2. Whether the failure of the court of appeals to act upon a petition for rehearing and suggestion for rehearing en banc, timely filed in accordance with rights conferred by Rules 40(a) and 35(b), FRAP, retains jurisdiction over the subject matter of the appealed pre-trial collateral order "in" the court of appeals and outside the jurisdiction of the district court, ousted from jurisdiction over that subject

matter thereof by the filing of the timely notice of appeal of the collateral order?

3. Whether a pre-trial collateral order ordering the turning over of Petitioner's private papers and effects, including tax and other financial information, submitted by defendant attorneys, signed without change by a district court judge without prior hearing thereon or application by motion therefor and threatening dismissal of Petitioner's case for non-compliance therewith (the "June 12 Order"), is an illegal order threatening Petitioner with irreparable harm, meriting constitutional protection of Petitioner's rights to privacy through appellate review of that motionless and hearingless collateral order as an appealable order?

4. Whether the service on defendants, prior to the date proposed for a proceeding that is the subject matter of orders for which a timely notice of appeal has previously been filed, of Rule 26(c), FRCP, protective order motions objecting to the place, subject matter and purposes of the proceedings as improper and objectionable and motions to stay such proceedings, required by Rule 8(a), FRAP, excuses a party deponent pursuant to the excusal proviso of Rule 37(d), FRCP, from attending the place proposed for the oral deposition and for the production of documents?

5. Whether the June 12 collateral order, ordering the turning over of Petitioner's private papers and effects, including tax and other financial information, submitted to a district court judge for signature by defendant attorneys without a previous

application therefor and without a noticed hearing thereon, required by the Federal Rules of Civil Procedure and Northern District of California Local Rules, and signed without change by the district court judge in violation of the judges' previously issued Rule 16(e), FRCP, pre-trial order, threatens irreparable harm to Petitioner and is an appealable collateral order?

6. Whether the June 12 collateral order, submitted by defendant members of the city attorney's office in violation of the Federal Rules of Civil Procedure and Northern District of California Local Rules, and signed without change by the district court judge in violation of the judges' previously issued Rule 16(e), FRCP, pre-trial order (1) that denies Petitioner's motion to stay discovery

proceedings pending appeal, (2) that denies Petitioner's motions for protective orders objecting to the place, subject matter and purposes of the proceedings as improper and objectionable, (3) that ordersthe production of private records and privileged documents without a hearing, and (4) that threatens the dismissal of a case for lack of compliance therewith, is an appealable collateral order?

7. Whether members of a city attorney's office, who are defendants in their personal capacities for administrative and other acts outside the scope of their employment and, therefore, personally liable for their acts and omissions outside their official capacities in 15 U.S.C., Section 1, price-fixing and 42 U.S.C., Sections 1983, 1985 (2), (3), 1986 and 1988 civil rights claims, may represent without

a conflict of interest a municipal entity defendant that is also a defendant in those actions, thereby exposing the municipality to enhanced liability, based on acts and omissions to act in the selfsame proceedings by those defendant city attorneys in furtherance of their own personal interests?

8. Whether the court of appeals panel's adverse disposition in its April 1 Memorandum of Petitioner's appeal of the July 16 pre-trial dismissal order (the "July 16 Order") is consistent with the memorandum's stated standard that disobedient conduct not shown to be out side the control of the litigant is all that is required to demonstrate willfulness, bad faith or fault, when the motionless and hearingless July 16 dismissal order on its face invokes

dismissal at the same time it denies Petitioner's motions to vacate the discovery order and to stay all discovery, thus rendering impossible and outside the control of Petitioner his compliance with the simultaneously activated purported warning discovery order in a case that is simultaneously being dismissed?

9. Whether under this Court's precedent in Link v. Wabash R.R. Co., 370 U.S. 626 (1962), Northern District of California Local Rule 235-10, requiring a noticed hearing for dismissal of a case for lack of prosecution, limits the authority of a district court to sign a pre-trial dismissal order without change, submitted by defendant members of the city attorney's office, dismissing a case for lack of prosecution without a noticed hearing thereon and without an application therefor

by a Rule 41(b), FRCP, motion meeting the Due Process requirements of Rules 5 and 7(b)(1), FRCP, and Northern District of California Local Rule 220-2?

10. Whether the court of appeals panel's adverse disposition in its April 1 Memorandum of Petitioner's appeal of the July 16 pre-trial dismissal order is consistent with (1) the memorandum's stated standard that the district court must weigh five factors before imposing dismissal, when the motionless and hearingless July 16 dismissal order on its face weighs no such factors, (2) the memorandum's clearly erroneous finding of fact that the district court based its dismissal on its authority under Rules 37 and 41, FRCP, or on the district court's inherent power, when the hearingless and motionless July 16 Order on its face states no legal basis for the

authority to sign the order and bears the title of "Proposed Order of Dismissal," prepared by defendant members of the city attorney's office, and (3) the memorandum's citation as "inapposite" of Insurance Company of Ireland, Ltd v. Compagnie des Bauxite de Guinee, 456 U.S. 694 (1982), when this Court in that precedent established Due Process standards that limit a district court's discretion to impose sanctions - First, that any sanction must be "just" under general due process restrictions and, Second, that the sanction must be related to the particular "claim" which was at issue in the order to provide discovery?

11. Whether the court of appeals panel's adverse disposition in its April 1 Memorandum of Petitioner's appeal of the hearingless and motionless July 16 Order is

consistent with the memorandum's clearly erroneous finding of fact that Petitioner's prior appeals were dismissed for lack of jurisdiction (1) when published 9th Circuit decisional case law invests the court of appeals with jurisdiction over the subject matter of an appealed order while the question is pending whether the order being appealed is appealable, (2) when the court of appeals had not decided at the time of the signing without change and entry of both the hearingless and motionlesss June 12 collateral order and the motionless and hearingless July 16 pre-trial dismissal order based thereon the questions of appealability of collateral orders that were then pending before the appellate court and that embraced the subject matters contained in the June 12 collateral order and the July 16 Order, and (3) when the court of appeals has failed to act upon

Petitioner's petition for rehearing and suggestion for rehearing en banc in his appeal of the June 12 collateral order, timely filed in accordance with Rules 40(a) and 35(b), FRAP, (See Question Presented No. 2)?

12. Whether the court of appeals panel's adverse disposition in its April 1 Memorandum of Petitioner's appeal of the July 16 Order is consistent with (1) the memorandum's failure to assign responsibility for delays in the action, and (2) the memorandum's finding of no indication of impartiality on the part of the district court judge?

13. Whether the court of appeals panel's adverse disposition in its April 1 Memorandum of Petitioner's appeal of the hearingless and motionless July 16 Order

that the district court did not abuse its discretion by consolidating 2 actions is itself an abuse of discretion, when the court of appeals panel knew that the consolidation was inconsistent with the holding of this Court in Johnson v. Manhattan Ry. Co., 298 U.S. 479, 496-497 (1933) that consolidation must neither change the rights of parties nor merge the suit into a single cause of action and when the district court judge knew in consolidating the 2 actions (1) that members of the city attorney's office were defendants in their personal capacities in both actions and (2) that members of the city attorney's office in the later-filed action had already admitted in their answer in the second action their involvement in a conspiracy to fix prices and in furtherance of that conspiracy their earlier deception of the district court in the presentation

to an earlier assigned district court judge for judicial signature of an order, signed without change by that judge, that did not reflect the prior decisions of that judge?

14. Whether the court of appeals panel in its April 1 Memorandum abused its discretion by denying Petitioner his right to oral argument pursuant to Rule 34(a), FRAP, and 9th Circuit Rule 34-4, when the panel adversely disposed of Petitioner's appeal, based upon misrepresentations of fact and law contained in the appellees' brief, after Petitioner in his statement requesting oral argument had informed the panel (1) that the defendant-appellee members of the city attorney's office submitting the appellees' brief had inherent and irreconcilable conflicts of interest between the personal interests of those members and the interests of the

municipal entity and other co-defendant appellees they purported to represent and (2) that in the submission of their appellees' brief, those members of the city attorney's office inserted over forty-four (44) unsubstantiated assertions of alleged "fact" with no citation references to the records in violation of Rule 28(a)(4) and (e), FRAP, and 9th Circuit Rule 28-2.8?

15. Whether the court of appeals panel has a duty as an independent, neutral and impartial tribunal under the Due Process and Equal Protection provisions of the Fifth Amendment to determine all issues, factual and legal, raised in Petitioner's opening brief and reply brief that bear on the panel's review under 28 U.S.C., Section 1291, of Petitioner's appeal of the July 16 Order or whether the panel may arbitrarily fail to acknowledge and decide the

dispositive issues set forth in those briefs of the failure of the district court and the defendant city attorneys, in the signing without change of both the July 16 dismissal order and the June 12 collateral order upon which the July 16 Order is based, to comply with the Federal Rules of Civil Procedure promulgated by this Court, the Northern District of California Local Rules adopted thereunder and the district court judge's own previously issued Rule 16(e), FRCP, pre-trial order?

16. Whether a person other than an Article III court of appeals judge may decide and issue a pre-briefing order to show cause, raising the question of the jurisdiction of a court of appeals panel to review a collateral order for which a timely notice of appeal has been filed, when that order to show cause (1) creates a presumption

against that jurisdiction, (2) fails to specify and provide Petitioner with notice of objections to which he can respond to the decision of that person other than an Article III Judge that the court of appeals panel may lack jurisdiction over the appealed order, and (3) orders automatic dismissal of the appeal for failure to comply with the order to show cause?

## PARTIES

The parties to the appeal to the United States Court of Appeals For The Ninth Circuit are James Reyer, Plaintiff-Appellant, and Defendants - Appellees William G. Todd, Able Towing Company, Charles R. Willard, Willard Lien Service and Laura Stager, Matthew J. LeBlanc, Salvatore V. Rosano, Kenneth R. Blackman, Rene A. Chouteau, Mark L. Hulsman, Nanci Burton, John J. Healy, Schuyler L. Jeffries, James E. Pedgrift, David F. Berto and Theresa L. Cunningham, personally and individually and in their official capacities, and the City of Santa Rosa, California.

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PETITON FOR WRIT OF CERTIORARI
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FOR THE NINTH CIRCUIT

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Petitioner James Reyer respectfully prays that a Writ of Certiorari issue to review the hearingless and motionless July 16 Order, appealed from a panel memorandum of the United States Court of Appeals for the Ninth Circuit, filed on April 1, 1993.

## MEMORANDUM AND ORDERS BELOW

The Ninth Circuit memorandum, entered April 1, 1993, which is not published in official reports, is set forth at Pages A2-A9 of the Appendix. The Ninth Circuit order, entered June 28, 1993, denying Petitioner's petition for rehearing of the April 1 Memorandum and rejecting Petitioner's suggestion for rehearing en banc, is set forth at Page A20 of the Appendix.

The July 16 Order, the subject of Petitioner's appeal, which is not published in official reports, is set forth at Pages A10-A12 of the Appendix.

The June 12 Order, upon which the July 16 Order is based, which is not published in official reports, is set forth at Pages A13-A15 of the Appendix.

The court of appeals order, filed November 24, 1992, denying Petitioner's appeal of a district court consolidation order and related pre-trial orders, permitting discovery by defendant member of the city attorney's office, not published in official reports, is set forth at Page A21 of the Appendix. The consolidation order and the related pre-trial order that was the subject of that appeal, not published in official reports, are set forth at Pages A16-A19. The order of the court of appeals, dismissing that appeal and filed on August 26, 1992, not published in official reports, is set forth at Pages A22-A23 of the Appendix.

The order of the court of appeals, filed October 16, 1992, dismissing Petitioner's appeal of the June 12 Order, not published in official reports, is set forth at Pages A24-A25 of the Appendix.

## JURISDICTION

The Memorandum of the Ninth Circuit was entered on April , 1993. a timely petition for rehearing and suggestion for rehearing en banc was filed, which was denied by an order entered June 28, 1993. Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1), 28 U.S.C. 2101(c) and Supreme Court Rules 13.1 and 13.4. Federal jurisdiction in the district court of first instance in this appeal is conferred under the provisions of 28 U.S.C. 1331 and 1343 for claims involving damages, injunctive and declaratory relief arising under 42 U.S.C., Sections 1983, 1985(2), (3), 1986 and 1988. 15 U.S.C., Section 1 et seq. and 28 U.S.C., Sections 2201 and 2202.

## STATEMENT OF THE CASE

The court of appeals panel charged under 28 U.S.C., Section 1291, with the review of Petitioner's appeal of a motionless and hearingless pre-trial dismissal order has failed to acknowledge and decide in its memorandum, filed April 1, 1993 (the "April 1 Memorandum") the dispositive issues, factual and legal, raised in Petitioner's opening appellant's brief and reply brief of the failure of the district court and the defendant city attorneys, in the signing without change of both the July 16 dismissal order, entered July 16, 1992 (the "July 16 Order"), and a collateral order upon which the July 16 Order of dismissal is based, to comply with the Federal Rules of Civil Procedure promulgated by this Court, the Northern District of California Local Rules adopted thereunder and the district court judge's

own previously issued Rule 16(e), FRCP, pre-trial order. See April 1 Memorandum, at Appendix Pages A2-A9.

The court of appeals panel in the April 1 Memorandum detaches itself from review of the face of the July 16 order, which itself is cardinal evidence of the submission of that motionless and hearingless dismissal order by defendant members of the city attorney's office in violation of rules that are intended to afford due process of law by providing safeguards against unfair procedures in the securing of rights under the Due Process provisions of the Fifth Amendment. See July 16 "Proposed Order of Dismissal," at Appendix Pages A10-A12.

The court of appeals panel likewise detaches itself from a similar review of the face of the June 12 Order upon which the July 16 Order is based. That collateral

order is additional signal evidence of the signing without change by a district court judge of a collateral order, ordering the turning over of Petitioner's private papers and effects, including tax and other financial information, submitted by defendant members of the city attorney's office, signed without change by a district court judge without prior hearing thereon or application by motion therefor, and threatening dismissal of Petitioner's case for non-compliance therewith. See June 12 Ex Parte Collateral Order, at Appendix Pages A13-A15.

The conclusions offered in the April 1 Memorandum directly conflict with the Federal Rules of Civil Procedure and the Local Rules of the Northern District of California fundamentally (1) applicable to the motionless and hearingless July 16 Order, attempting to dismiss two separate

cases without a hearing, notice or motion, and (2) applicable to the proceedingless June 12 collateral order and attempting to impose on Petitioner deposition and private paper and other private effects production obligations in an ex parte telephone call to the district court judge, unrestrained by the requisites of an equally absent notice, hearing or motion.

In addition to detaching itself from a review of the issues raised in Petitioner's opening and reply briefs of the failure of the district court judge and the defendant members of the city attorney's office to respect the Federal Rules of Civil Procedure promulgated by this Court and the Northern District of California Local Rules adopted thereunder, the court of appeals panel through its April 1 Memorandum chooses to disengage itself from honoring well-settled precedent

of this Court on the issues of (1) district court jurisdiction divestiture on appeal in Griggs v. Provident Consumer Discount Company, 459 U.S. 56, 58 (1982), (2) the consolidation doctrine against merging of separate identity cases established in Johnson v. Manhattan Ry. Co., 298 U.S. 479, 496-497 (1933), (3) the applicability of Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxite de Guinee, 456 U.S. 694 (1982) ("Insurance Corp. of Ireland") to a memorandum that offers Rule 37, FRCP, discovery sanctions as a legal basis for the signing of the hearingless and motionless July 16 Order attempting dismissal on those grounds, and (4) the mandate in Link v. Wabash Railroad Company, 370 U.S. 626, 633 n.8 (1962) to observe local rules, such as Local Rule 235-10 of the Northern district of California, in

proceedings to consider dismissal for lack of prosecution.

The court of appeals panel equally detaches itself from enforcing published decisional Ninth Circuit case law and Northern District of California Local Rules on those issues that were raised in Petitioner's opening brief and reply brief that conflict with the conclusions offered in the April 1 Memorandum and that are also dispositive of the central issues in Petitioner's appeal of the proceedingless July 16 Order ordering dismissal.

In the panel's adverse disposition of Petitioner's appeal of the July 16 Order, the panel denied Petitioner his right to oral argument pursuant to Rule 34(a), FRAP, and 9th Circuit Rule 34-4. April 1 Memorandum, at Appendix Page A3. Nevertheless, the panel adversely disposed of Petitioner's appeal, based upon

misrepresentations of fact and law in the appellees' brief.

Petitioner had informed the panel in his statement requesting oral argument (1) that the defendant-appellee members of the city attorney's office submitting the appellees' brief had inherent and irreconcilable conflicts of interest between the personal interests of those members and the interests of the municipal entity and other co-defendant appellees they purported to represent and (2) that in the submission of their appellees' brief, those members of the city attorney's office inserted over forty-four (44) unsubstantiated assertions of alleged "fact" with no citation references to the records in violation of Rule 28(a)(4) and (e), FRAP, and 9th Circuit Rule 28-2.8.

The panel in its April 1 Memorandum finds no evidence of impartiality on the

part of the district court judge. Even so, the memorandum fails to reverse the proceedingless July 16 Order and the ex parte June 12 Order. April 1 Memorandum, at Appendix Pages A8 A9.

The records of the two (2) separate cases before the court of appeals panel reveal that the district court judge detached herself from compliance with the Federal Rules of Civil Procedure, Local Rules and even her own Rule 16(e), FRCP, pretrial order in signing the procedureless July 16 Order and the procedureless June 12 Order. See April 17 Pre-Trial Order, at Appendix Pages A18-A19. Also see Appellant's Brief, at Pages 3 to 6, 14 to 19 (Issue Three), 19 to 29 (Issue Four), 32 to 35 (Issue Six), 34 to 38 (Issue Seven) and 38 to 42 (Issue Eight). Appellant's Rebuttal Brief, at Pages 1 to 6, 6 to 8 (Rebuttal Argument One), 8 to 14 (Rebuttal

Argument Two), 14 to 18 (Rebuttal Argument Three), 18 and 19 (Rebuttal Argument Five) and 22 to 25 (Rebuttal Argument Seven).

The court of appeals panel similarly detached itself from examination of the absence of procedural compliance in the signing of those orders. The April 1 Memorandum evidences that disengagement.

But of even greater moment is the duty of the Court of Appeals to defend institutions of justice against defendant attorneys who would usurp the Article III judicial power of the Constitution, by writing into orders submitted for court signature, orders directing actions of opposing parties that the court has not previously decided, and, then, who deceive the judge at hand into accepting the inserted order as the judges own decision, despite the reality of the clerk's record that shows no hearing on the inserted order

- or notice, motion or other procedural compliance.

The misconduct of the defendant members of the city attorney's office in the litigation that is the subject matter of this appeal infects the judicial process with a disabling disease of deceit that the courts must act to expunge, for if courts remain passive, that disease will spread until it destroys a judicial process and a legal profession no longer worth preserving. Pac-Tec, Inc. v. Amerace Corp., 903 F.2d 796, 800-801 (Fed. Cir. 1990).

Petitioner in his verified First Amended Complaint prosecuted a later-filed case, No. CV-90-3372, pursuant to 42 U.S.C. 1983, 1985 (2), (3), 1986 and 1988, significantly to relieve Petitioner of the fraud on the district court by defendant city attorneys in an earlier case, No. CV-89-3839.

That verified First Amended Complaint alleged therein deprivation of Petitioner's property as well as his rights to meaningful, effective access to the courts and deprivation of other rights secured by the United States Constitution.

Petitioner had filed the earlier case, CV-89-3839, under 15 U.S.C. 1 et seq., alleging the fixing of unauthorized towing prices and vehicle storage rates. Members of the city attorney's office later admitted as a matter of law in their answer to Petitioner's First Amended Complaint in CV-90-3372, that they conspired with others, including other city officials and towing company personnel and agents to extort monies from members of the public whose vehicles were towed at the direction of city personnel.

In addition, Petitioner brought the earlier case, CV-89-3839, pursuant to 42

U.S.C. 1983, 1985 (2), (3), 1986 and 1988 for the illegal seizure and detention of his own automobile as a consequence of those extortion activities, where his 4-door Sedan and the contents thereof were illegally seized in violation of the Fourth Amendment, without Petitioner's being charged with the violation of any law.

Defendants continue to hold and detain Petitioner's 4-Door Sedan and professional and personal property contained therein, without charges, and have done so continuously since October 26, 1988, the day Petitioner's property was seized.

**I. The signing by the district court of the July 16 Order on July 12, 1992 and the entry of that order on July 16, 1992, rendered that dismissal order void and a nullity. Appeals of subject matters contained in the dismissal order were pending before the Court of Appeals at the time the district court signed and entered that order.**

BEST AVAIL

Petitioner filed on May 15, 1992, a timely notice of appeal, appealing the subject matter of the consolidation of 2 cases, when the district court judge consolidated the 2 cases, even though the judge knew at the time of consolidation that (1) that members of the city attorney's office were defendants in their personal capacities in both actions and (2) that members of the city attorney's office in the later-filed action had already admitted in their answer in the second action their involvement in a conspiracy to fix prices and in furtherance of that conspiracy their earlier deception of the district court in the presentation to an earlier assigned district court judge for judicial signature of an order, signed without change by that judge, that did not reflect the prior decisions of that judge. A central issue in that May 15 appeal of

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the consolidation and related orders was the approval of the district court of the conducting of discovery by the defendant members of the city attorney's office after those admissions.

Petitioner filed on June 26, 1992, after learning of the signing of the June 12 Order a timely notice of appeal of that hearingless and motionless June 12 Order, (1) that orders the production of private records and privileged documents without a hearing (2) that denies Petitioner's motion to stay discovery proceedings pending appeal, (3) that denies Petitioner's motions for protective orders objecting to the place, subject matter and purposes of the proceedings as improper and objectionable, and (4) that threatens the dismissal of a case for lack of compliance therewith.

The filing of the May 15 notice of appeal divested the district court of its control over the subject matter of discovery in CV-89-3839, the subject matter of the participation in and conducting of that discovery by the order-writing defendant city attorneys and the subject matter of the consolidation of CV-90-3372 and CV-89-3839. The filing of the June 26 notice of appeal divested the district court specifically of its control over the subject matter of the June 12 collateral order, the suspension by Petitioner of compliance with which, pending appeal and reconsideration thereof, the members of the defendant city attorney's office based the later dismissal order in their "Proposed Order of Dismissal." See July 16 "Proposed Order of Dismissal," at Appendix Pages A10-A12.

The filing of these notices of appeal transferred jurisdiction to the Court of Appeals over the subject matters for decision by the appellate court on those subject matters contained in the notices of appeal seeking appellate review. The orders containing those subject matters were pending before this Court at the time the district court signed and entered the July 16 Order, based on the discovery matters involved in the June 12 Order.

This Court has held that the filing of a notice of appeal is an event of jurisdictional significance:

"The filing of a notice of appeal is an event of jurisdictional significance - it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal. See, eg., United States v. Hitchmon, 587 F.2d 1357 (CA5 1979). Cf. Ruby v. Secretary of the United States Navy, 365 F.2d 385, 389 (CA9 1966) (en banc) (notice of appeal from unappealable order does not divest district court of jurisdiction) ,cert. denied, 386

U.S. 1011 (1967)." Griggs v. Provident Consumer Discount Company, 459 U.S. 56, 58 (1982).

The Court of Appeals has jurisdiction over an appeal while the question is pending as to whether the order being appealed is appealable. Cord v. Smith, 370 F.2d 418, 421 n. 2 (9th Cir. 1966), citing also, as the Supreme Court did above in Griggs, Cf. Ruby v. Secretary of the United States Navy, supra. An appeal is pending once the notice of appeal is filed and during its pendency the district court has a very limited power to act with respect to the matters appealed. See Rule 3, FRAP. United States v. Hitchmon, supra, at 1359.

Other Ninth Circuit case published decisions reinforce that divestiture doctrine. The jurisdiction over any matters involved in the appeal is immediately transferred from the district court to the court of appeals. Matter of

Thorp, 655 F.2d 997, 998 (9th Cir. 1991). An appeal seeking review of collateral orders deprives the trial court of jurisdiction of all matters that are the subject matter of the appeal. Britton v. Co-op Banking Group, 916 F.2d 1405, 1411-1412 (9th Cir. 1990) (appeal of a collateral order not concerning issue of discovery does not divest the district court of jurisdiction over discovery). The district court is ousted from jurisdiction over the subject matter of the appeal after the appeal has been filed and before the court of appeals has issued its mandate. Masalosalo v. Stonewall Ins. Co., 718 F.2d 955, 956 (9th Cir. 1983); Matter of Thorp, supra, at 998.

After a decision by the circuit court of appeals, the only step that a district court can take is to obey the mandate, and where a decree of the court of appeals is

entered pursuant to that decision of the appellate court, proper deference to the reviewing court's authority requires that a proceeding to re-open the decree, whether by rehearing or review, should first be referred to the reviewing tribunal before district court action. Rogers v. Consolidated Rock Products Co., 114 F.2d 108, 109 (9th Cir. 1940), citing Simmons Co. v. Grier Bros. Co., 258 U.S. 82, 91 (1922).

**A. Compliance with orders pending appeal would render moot appellate review.**

The failure of a district court to allow the appellate process to run its course leaves no alternative to the Petitioner but to withhold compliance with the appealed order if he or she wishes to preserve the issue for appellate review. The Ninth Circuit has affirmed that

compliance with the appealed order would render moot a petition for rehearing and possible petition for certiorari. Matter of Thorp, supra, at 999. Compliance with an appealed collateral order that the court of appeals later decides is a nonappealable order, but is elected to be treated by the reviewing court as an application for a writ, would similarly render moot the decision of the court of appeals and later petitions for rehearing and certiorari. See Cord v. Smith, 370 F.2d 418, 421 n.2, and cited therein FTC v. Dean Foods Co., 384 U.S. 597, 603-605 (1966). See also Cord v. Smith, 338 F.2d 516, 521 (9th Cir. 1964).

**B. The May 15 and June 29 notices of appeal were pending before the Court of Appeals at the time of the signing and entry of both the June 12 Order and the July 16 Order, ordering dismissal, based on purported non-compliance with the the June 12 Order.**

Both the May 15 notice of appeal and the June 26 notice of appeal were pending before the Court of Appeals at the time the July 16 dismissal order, based on Petitioner's suspension of compliance with the June 12 Order, was signed on July 12, 1992, and entered in the district court on July 16, 1992.

Petitioner's petition for rehearing on the dismissal of the May 15 appeal was denied on November 24, 1992. See Appendix Pages A21. The appeal itself was dismissed on August 26, 1992, significantly after the signing and entry of the July 16 Order, ordering dismissal. See Appendix Pages A22-A23. The period for filing a petition for writ of certiorari to the Supreme Court on the subject matter of the May 15 appeal had not run its course as of the date of the submission on December 10, 1992 of Petitioner's opening brief to the Court of

Appeals, filed in his appeal that is the subject of this Petition.

Petitioner's June 26 appeal of the June 12 Order was denied on October 16, 1992, three (3) months after the signing and entry of the July 16 Order. See Appendix Pages A24-A25. Petitioner filed a petition for rehearing and suggestion for rehearing en banc with the Court of Appeals on October 30, 1992. A mandate was improperly issued on November 17, 1992, without a decision on that petition for rehearing and suggestion for rehearing en banc. Here, the period for filing a petition for writ of certiorari to the Supreme Court as of the date hereof has not yet commenced on that collateral order, as the Court of Appeals has not as of this date rendered a decision on Petitioner's petition for rehearing and suggestion for rehearing en banc with respect thereto.

The subject matter of discovery in case No. CV-89-3839, the subject matter of the conducting of that discovery by the order-writing defendant city attorneys and the subject matter of the consolidation of CV-90-3372 and CV-89-3839 were pending in the Court of Appeals in the May 15 appeal at the time of the signing and entry of the July 16 Order. See Appendix Pages A-16-A19.

The district court had no jurisdiction to sign and enter the July 16 Order, ordering dismissal. In addition, the subject matter of the June 12 Order, the suspension of compliance with which the July 16 Order was based, was pending in the Court of Appeals in the June 26 appeal at the time of the signing and entry of the July 16 Order. See Appendix Pages A24-A25. That dismissal order is void and a nullity under the published decisions of the Ninth Circuit. Matter of Thorp, supra, at 999.

Nevertheless, the court of appeals panel in the April 1 Memorandum, without finding facts or applying reasoned application of facts to stated principles of jurisdiction divestiture, offers only a conclusory statement on the issue:

"We find no merit in Reyer's remaining arguments. First, Reyer's prior appeals in this action, which we dismissed for lack of jurisdiction, did not divest the district court of its jurisdiction over the action." April 1 Memorandum, at Appendix Page A7.

**II. Petitioner's rights threatened by the illegal June 12 Order, ordering (1) the production of private records and privileged documents without a hearing or motion therefor, (2) denying Petitioner's motion to stay discovery proceedings pending appeal, (3) denying Petitioner's motions for protective orders objecting to the place, subject matter and purposes of the proceedings as improper and objectionable, and (4) threatening the dismissal of a case for lack of compliance therewith, merits constitutional protection, and the Court of Appeals as of this date has not responded to Petitioner's Petition for Rehearing and Suggestion for**

**Rehearing En Banc, filed October 30, 1992.**

This Court has in its most recently concluded term held that when a governmental entity has already illegally obtained private information that invades a person's right to privacy, it will fashion a remedy to prevent a further invasion of that interest in privacy. Church of Scientology of California v. U.S., 506 U.S.___, 113 S.Ct. 447, 450, 121 L.Ed. 2d 313, 319 (1992).

Petitioner in his suspension of compliance with the proceedingless June 12 Order, pending the appeal thereof and reconsideration thereof, attempted to prevent *ab initio* the invasion of the privacy of his private and professional papers and effects from the threat to his privacy interests, meriting constitutional protection.

Prevention of that invasion is much preferred than an attempt to fashion a later remedy to limit the adverse effects of irreparable harm already implemented. Church of Scientology of California v. U.S., supra, 113 S.Ct.,at 450, 121 L.Ed. 2d, at 319.

**III. Petitioner was excused, under the Rule 37(d), FRCP, deposition excusal proviso, from attendance at the May 26, 1992 and June 30, 1992 proposed depositions and for the production of documents thereat by serving on the defendant city attorneys Rule 26(c), FRCP, protective order motions, objecting to the place, subject matter and purposes of the proceedings and notice thereof prior to those dates, respectively.**

The defendant members of the city attorney's office in bad faith willfully failed to meet and confer with Petitioner, as required by Local Rule 230-4, about his objections to their discovery requests.

Petitioner was excused, under the Rule 37(d), FRCP, deposition excusal proviso, from attendance at and the production of documents at the May 26, 1992 and June 30, 1992 proposed depositions by serving on the defendant city attorneys Rule 26(c), FRCP, protective order motions objecting to the proceedings and notice thereof prior to those dates, respectively, after the defendant city attorneys in bad faith willfully failed to meet and confer with Petitioner, as required by Local Rule 230-4, about his objections to their discovery requests; Rule 37(d) (Excusal Proviso) and Rule 5(b), FRCP; Local Rule 230-4; Collins v. Wayland, 139 F.2d 677, 678 (9th Cir. 1944). See Proviso and Notes of Advisory Committee on 1970 Amendments to Rules, Rule 37(d), FRCP, at Appendix Pages A32-A33.

There is no justification for holding that an Petitioner's suspension of

compliance with an order pending appeal and reconsideration of motions with respect thereto have been unreasonable, when the Petitioner's actions are in conformity with procedural rules in effect at the time of the party's actions. Nealey v. Transportacion Maritima Mexicana, S.A., 662 F.2d 1275, 1282 n. 13 (9th Cir. 1980).

**IV. The hearingless and motionless July 16 Order of dismissal written by the defendant members of the city attorney' office for the dismissal for lack of prosecution and submitted to the district court for signature without a motion is in violation of Local Rule 235-10, authorized by this Court in Link v. Wabash Railroad Company, requiring that the dismissal of a case for lack of prosecution be the result of a noticed hearing on a district court judge's dismissal calendar or the result of a party's motion under Rule 41(b), FRCP.**

Northern District of California Local Rule 235-10 requires that the dismissal of

a case for lack of prosecution must either be the result of a noticed hearing called by the district court judge on that judge's dismissal calendar or the result of an application to the court through a party's motion:

"235-10. Dismissal for Lack of Prosecution. Each judge may from time to time notice for hearing on a dismissal calendar such actions or proceedings assigned to that judge which appear to him not to have been diligently prosecuted. Whenever it appears that plaintiff has failed to prosecute an action or to proceed diligently, the assigned judge may order it dismissed; failure to serve the initial pleading within forty days of filing and, in the absence of an order of the assigned judge setting any date for any pretrial proceeding or for trial, failure by plaintiff to take action for four months shall be presumptive evidence of lack of prosecution. Unless otherwise ordered by the assigned judge, each party shall, not less than ten days prior to the noticed hearing date, serve and file a certificate setting forth the status of the action or proceeding and whether good cause exists to dismiss it for failure to prosecute. Nothing in this Rule shall preclude any party from filing a motion to dismiss an action or proceeding for failure to prosecute under Rule 41(b), Federal Rules of Civil Procedure."

This Court has decided in Link v. Wabash Railroad Company, that when a district court adopts a local rule to enforce due process through a noticed hearing for lack of prosecution issues, that local rule is applicable to such matters. Link v. Wabash Railroad Company, 370 U.S. 626, 633 n.8 (1962).

The hearingless and motionless July 16 Order attempting to dismiss two (2) cases for lack of prosecution was written by a defendant member of the city attorney's office and initiated by that attorney, not with a motion, but with a cover letter asking for a signature thereon. July 8 Cover Letter. (1989 CT 138, Exhibit A). [1989 CT 129 (1:1-4)]. The hearingless and motionless July 16 Order was signed by the district court on the basis of the cover letter, but retained the title of "Proposed

Order of Dismissal." See July 16 "Proposed Order of Dismissal," at Appendix Page A10.

The motionless and hearingless July 16 Order was neither a *sua sponte* order of the district court nor the result of a motion by the defendant order-writing city attorneys. (1989 CT 138, Exhibit A). [1989 CT 129 (1:1-4)].

**V. The violations of rules of the Federal Rules of Civil Procedure and the Northern District Local Rules designed to afford due process of law by providing safeguards against unfair procedures denies rights secured by the Due Process provisions of the Fifth Amendment.**

The denial of Petitioner's procedural and substantive rights by the defendant members of the city attorney's office, through their deceptive obtaining, writing and presentation for signing of the July 16 dismissal order and the June 12 Order,

denied Petitioner his due process right to give his side of the story. Cleveland Bd. of Education v. Loudermill, 470 U.S. 532, 546 (1985). The violation of rules designed to afford due process of law by providing safeguards against unfair procedures denies rights secured by the due process provisions of the Fifth Amendment. U.S. v. Caceres, 440 U.S. 741, 749 (1979), citing Bridges v. Wixon, 326 U.S. 135, 152-153 (1945).

Due process is expressly violated by ex parte communication with judicial decision-makers that result in the deprivation of procedural and substantive rights. Vitarelli v. Seaton, 359 U.S. 535 (1959); Service v. Dulles, 354 U.S. 363 (1957); U.S. ex rel. Accardi v. Shaughnessy, 347 U.S. 260 (1954).

The full hearing requirement of a judicial proceeding requires that the facts

that underlie an order result from the interplay of argument. Morgan v. U.S., 298 U.S. 468, 480-481 (1936). Hughes, J.

A full, fair and open hearing affords a reasonable opportunity to know the objections of the opposing parties. Morgan v. U.S., 304 U.S. 1, 17-22 (1938). The absence of an opportunity to be heard and to contest the distortions of the district court procedural and evidentiary record reflected in the June 12 Order and the July 16 dismissal order undermined Petitioner's fundamental Due Process right to support the reality of his claims, privileges and rights with full argument and proof. Londoner v. Denver, 210 U.S. 373, 386 (1908); Pittsburgh C., C. &St. L. Co. v. Backus, 154 U.S. 421, 426 (1894); Morgan v. U.S., 304 U.S., at 19-20.

Petitioner suspended compliance with the June 12 Order to appear for a

deposition and production of documents on June 30, 1992. Petitioner filed and served on the Appellees on June 26, 1992, a timely notice of appeal for appellate review of the June 12 Order. Petitioner filed and served on Appellees on June 29, 1992, motions to reconsider and vacate that June 12 Order.

**VI. The submission of the Proposed Order of Dismissal without complying with the requirements of Rules 5 and 7(b)(1), FRCP, and Local Rule 220-2 constitutes a violation of the Federal Rules of Civil Procedure and Northern District of California Local rules and the denial of Petitioner's access to the Courts and his rights to Due Process.**

**A. Rules 5 and 7, FRCP, and Local Rule 220-2 require 28-day notice of a hearing, application to the Court in the form of motions in writing when not made during a hearing or trial, and require briefs or memoranda as well as affidavits or declarations under penalty of perjury to support all material factual contentions in the Proposed Order of Dismissal.**

Rule 7(b), FRCP, provides:

(b) Motions and Other Papers.
(1) An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing,shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.

(2) The rule applicable to captions and other matters of form of pleadings apply to all motions and other papers provided for by this rule.

(3) All motions shall be signed in accordance with Rule 11.

Rule 5(a) and (b) in pertinent part provide:

(a) Service: When Required. ...every written motion other than one which may be heard ex parte and every written notice, appearance, demand, offer of judgment, designation of record on appeal, and similar paper shall be served upon each of the parties ... .

(b) Same: How Made. Whenever under these rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service upon the party is ordered by the court... .

Northern District of California Local Rule 220-2 provides:

220-2. Notice and supporting papers. Except as otherwise ordered or permitted by the Judge, all motions, except those made in the course of a trial or hearing, shall be noticed in writing on the motion calendar of the assigned judge for hearing not less than 28 days after service. The noticed hearing date and time shall appear on the cover page of each motion, and of any opposition and reply, in the space opposite the caption below the file number. A public record of the date and time of each judge's motion calendar shall be maintained by the clerk and shall be published in an official newspaper of the court. Each notice of motion shall be accompanied by affidavits or declarations under penalty of perjury sufficient to support any material factual contentions, by an appropriate memorandum or brief and by a copy of a proposed form of order. Affidavits, declarations, and forms of orders shall not be physically attached to the notice or brief or memorandum and shall be separately captioned. Counsel shall have available at the hearing the original of any proposed form of order for signature by the Judge.

The submission by the defendant members of the city attorney's office of the "Proposed Order of Dismissal" that was

signed without change and became the July 16 Order violated the Federal Rules of Civil Procedure promulgated by this Court and the Northern District of California Local Rules adopted thereunder.

The July 16 Order was signed by the district court without change and without a 28-day notice of motion and motions requirement fulfillment, without fixing a hearing date, with no sufficient affidavits and memorandum or briefs to sustain the factual contentions in the "Proposed Order of Dismissal." That dismissal order was submitted and signed in naked violation of Rule 7(b), Rule 5 and Rule 11, FRCP.

**VII. The sanction of dismissal of CV-90-3372 and CV89-3839, written into the July 16 Order of dismissal by the defendant members of the city attorney's office (1) is not "just" and violates Due Process requirements and (2) does not relate to a particular "claim" at issue in the discovery order.**

Rule 37(b)(2), FRCP, that authorizes sanctions for violations of discovery orders contains 2 standards that limit a district court order for discovery sanctions. The first standard is that a sanction must be "just" and the second is that a sanction must be specifically related to the claim at issue in the order to provide that discovery. These standards were articulated by Mr. Justice White in the Supreme court case of Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 707 (1982) ("Insurance Corp. of Ireland"):

"Rule 37(b)(2) contains two standards - one general and one specific - that limit a district court's discretion. First, any sanction must be "just"; second, the sanction must be related to the particular "claim" which was at issue in the order to provide discovery. While the latter requirement reflects the rule of Hammond Packing, supra, the former represents the general due process restrictions on the court's discretion."

Unlike the July 16 Order written by the order-writing defendant city attorneys, the district court sanction order in Insurance Corp. of Ireland included a detailed explanation of the reasons for that order. Insurance Corp. of Ireland, supra, at 707.

**1. No Rule 37(a), Rule 7(b)(1), Local Rule 220-2 or Local Rule 230-4 motion to compel discovery or required supporting papers and no hearing or 28-day advance notice.**

The June 12 Order, written by defendant city attorneys, was signed and entered without change by the district court judge, without a motion to compel discovery made pursuant to Rule 37(a), FRCP, without a motion and written notice as an application therefor, as required by Rule 7(b)(1), FRCP, and without, as

required by Northern District of California Local Rule 220-2, a 28-day advance notice of hearing accompanied by an affidavit or declaration upon penalty of perjury sufficient to support all material factual contentions included in that order written by the defendant city attorneys, and without a memorandum or brief accompanying the non-existent motion, notice and affidavit.

The sanction declared by the district court on the other hand in Insurance Corp. of Ireland was imposed after a number of motions, orders and warnings of the consequences of the failure to comply with the orders of the court after the filing of those motions to compel production. Insurance Corp. of Ireland, supra, at 698-699. There were transcripts reviewed by this Court of the district court's

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prospective warnings of and imposition of the sanction order. Id., at 699.

**2. Petitioner filed the timely June 26 notice of appeal and June 29 motions for reconsideration, protective orders and disqualification of the order-writing defendant city attorneys in response to June 12 Order.**

The second Due Process line of inquiry that this Court invoked in Insurance Corp. of Ireland was whether the party toward whom the discovery order was directed agreed to comply with the discovery orders within a specified time period and failed to comply with those agreements. Insurance Corp. of Ireland, supra, at 708. Petitioner here suspended compliance with the ill-gotten discovery order written by the order-writing defendant city attorneys. Petitioner here sought the protection by

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the courts to the processes due him in the system of justice, under the Federal Rules of Civil Procedure, the Northern District of California Local Rules, and otherwise.

Petitioner, upon the receipt of the June 12 Order, filed and served on Appellees on June 26 a notice of appeal of that order and on June 29, 1992, a day before the June 30 deposition date written by the order-writing defendant city attorneys into that order, filed and served on Appellees prior to the proposed deposition his June 29 motion (1) to vacate the order, (2) to permanently enjoin defendants from denying the Petitioner access to the courts, (3) to specifically enjoin and disqualify all members of the city attorney's office from acting as attorneys to defendants, and (4) for protective orders:

A. to stay and enjoin all discovery pending the review by the court of appeals of the May 15 appeal and the June 26 appeal of the June 12 Order;

B. to vacate the April 21 notice of deposition and production of documents.;

C. to prohibit the taking of Petitioner's deposition thereunder and under the June 12 Order;

D. to prohibit the production of documents thereunder and under the June 12 Order.

Petitioner suspended compliance with the June 12 Order, pending a hearing on his motions and pending appellate review of the May 15 and June 26 appeals.

In an attempt to prevent the hearing on Petitioner's June 29 Motions, the defendant members of the city attorney's office submitted for signature of the district court judge the "Proposed Order of Dismissal" that fails to respond to all of Petitioner's June 29 Motions. July 16 Order, at Appendix Pages A10-A12.

**3. No relationship to a particular "claim" that was at issue in June 12 Order.**

The order-writing defendant city attorneys made no Rule 37(a), FRCP, motion to compel discovery in CV-89-3839 in order to obtain the June 12 Order. In addition to not being "just," the attempted dismissal sanction of the attempted dismissal of CV-90-3372 and CV-89-3839 contained in the July 16 Order did not relate to a "claim" at issue in the June 12 Order.

There had been at the time of the signing of the June 12 Order no status conference and still has been no status conference on CV-90-3372.

The order-writing defendant city attorneys made no Rule 37(a), FRCP, motion required by Northern District of California Local Rule 230-4, to obtain a discovery

order for CV-89-3839, to which the discovery order was addressed. There was no motion to define the "claim" at issue in the June 12 Order.

As there was no "claim" at issue in the June 12 Order, any sanction interfering with a litigant's claim or defenses violate Due Process when imposed for the punishment of an infraction that did not threaten to interfere with the rightful decision in the litigation. Wyle v. R. J. Reynold's Industries, Inc., 709 F.2d 585, 589-591 (9th Cir. 1983).

**VIII. This Court's Johnson Anti-Merger Doctrine prohibits the merging of separate identity cases into a single cause, rendering the proceedingless June 12 Order directed only toward case No. CV-89-3839 and rendering void, false and invalid the statement in the proceedingless July 16 Order that case No CV-90-3372 lost its identity and was consolidated as case No. CV-89-3839.**

Consolidation must neither change the rights of parties nor merge the suit into a single cause. Johnson v. Manhattan Ry. Co., 298 U.S. 479, 496-497 (1933), cited in Garber v. Randell, 477 F.2d 711, 715 (2nd Cir. 1973).

Even if the order of consolidation were not on appeal under the May 15 appeal at the time the June 12 Order was written by the defendant members of the city attorney's office, ousting the district court from jurisdiction over the subject matter of consolidation, the consolidation of case No. CV-90-3372 with case No. CV-89-3839 may not cause those actions to be merged into a single cause. Johnson v. Manhattan Ry. Co., supra.

The very caption of the proceedingless July 16 Order itself demonstrates the maintenance of the separate identities of of case No. CV-90-3372 and case No. CV-89-

3839, as required by Johnson v. Manhattan Ry. Co., supra. July 16 Order. See Appendix Pages A10.

**IX. Petitioner's right to impartial adjudication, secured by the Due Process provisions of the Fifth Amendment under this Court's decision in Marshall v. Jerrico, supra, was violated by the district court judge, consistent with the panel memorandum's finding that there is no indication of impartiality by the district court judge.**

The April 1 Memorandum has found that there is no indication of impartiality by the district court judge. April 1 Memorandum, at Appendix Page A8.

The records of the two (2) separate cases before the Court of Appeals reveal that the district court judge detached herself from compliance with the Federal Rules of Civil Procedure, Local Rules and even her own Rule 16(e), FRCP, pretrial

order in signing the procedureless July 16 Order and the procedureless June 12 Order. See April 17 Pretrial Order, at Appendix Pages A18-A19. Appellant's Brief, at Pages 3 to 6, 14 to 19 (Issue Three), 19 to 29 (Issue Four), 32 to 35 (Issue Six), 34 to 38 (Issue Seven) and 38 to 42 (Issue Eight). Appellant's Rebuttal Brief, at Pages 1 to 6, 6 to 8 (Rebuttal Argument One), 8 to 14 (Rebuttal Argument Two), 14 to 18 (Rebuttal Argument Three), 18 and 19 (Rebuttal Argument Five) and 22 to 25 (Rebuttal Argument Seven).

## REASONS FOR GRANTING WRIT

**(1) Certiorari should be granted because supervision of the courts of appeal requires that when a district court has departed so far from the accepted and usual course of judicial proceedings, a court of appeals should not detach itself from examination of that departure and thereby endorse that departure by the district court.**

The court of appeals panel charged under 28 U.S.C., Section 1291, with the review of Petitioner's appeal of a motionless and hearingless pre-trial dismissal order has failed to acknowledge and decide in its memorandum, filed April 1, 1993 (the "April 1 Memorandum") the dispositive issues, factual and legal, raised in Petitioner's opening appellant's brief and reply brief of the failure of the district court and the defendant city attorneys, in the signing without change of

collateral order upon which the July 16 Order of dismissal is based, to comply with the Federal Rules of Civil Procedure promulgated by this Court, the Northern District of California Local Rules adopted thereunder and the district court judge's own previously issued Rule 16(e), FRCP, pre-trial order. See April 1 Memorandum, at Appendix Pages A2-A9.

The court of appeals panel in the April 1 Memorandum detaches itself from review of the face of the July 16 order, which itself is cardinal evidence of the submission of that motionless and hearingless dismissal order by defendant members of the city attorney's office in violation of rules that are intended to afford due process of law by providing safeguards against unfair procedures in the securing of rights under the Due Process provisions of the Fifth Amendment. See July

16 "Proposed Order of Dismissal," at Appendix Pages A10-A12.

The court of appeals panel likewise detaches itself from a similar review of the face of the June 12 Order upon which the July 16 Order is based. That collateral order is additional signal evidence of the signing without change by a district court judge of a collateral order, ordering the turning over of Petitioner's private papers and effects, including tax and other financial information, submitted by defendant members of the city attorney's office, signed without change by a district court judge without prior hearing thereon or application by motion therefor, and threatening dismissal of Petitioner's case for non-compliance therewith. See June 12 Ex Parte Collateral Order, at Appendix Pages A13-A15.

The conclusions offered in the April 1 Memorandum directly conflict with the Federal Rules of Civil Procedure and the Local Rules of the Northern District of California fundamentally (1) applicable to the motionless and hearingless July 16 Order, attempting to dismiss two separate cases without a hearing, notice or motion, and (2) applicable to the proceedingless June 12 collateral order and attempting to impose on Petitioner deposition and private paper and other private effects production obligations in an ex parte telephone call to the district court judge, unrestrained by the requisites of an equally absent notice, hearing or motion.

**(2) Certiorari should be granted because the court of appeals in its April 1 Memorandum has rendered a decision that conflicts with applicable decisions of this Court and other courts of appeal and conflicts also with published decisions within its own circuit.**

In addition to detaching itself from a review of the issues raised in Petitioner's opening and reply briefs of the failure of the district court judge and the defendant members of the city attorney's office to respect the Federal Rules of Civil Procedure promulgated by this Court and the Northern District of California Local Rules adopted thereunder, the court of appeals panel through its April 1 Memorandum chooses to disengage itself from honoring well-settled precedent of this Court on the issues of (1) district court jurisdiction divestiture on appeal in Griggs v. Provident Consumer Discount Company, 459 U.S. 56, 58 (1982), (2) the

consolidation doctrine against merging of separate identity cases established in Johnson v. Manhattan Ry. Co., 298 U.S. 479, 496-497 (1933), (3) the applicability of Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxite de Guinee, 456 U.S. 694 (1982) ("Insurance Corp. of Ireland") to a memorandum that offers Rule 37, FRCP, discovery sanctions as a legal basis for the signing of the hearingless and motionless July 16 Order attempting dismissal on those grounds, and (4) the mandate in Link v. Wabash Railroad Company, 370 U.S. 626, 633 n.8 (1962) to observe local rules, such as Local Rule 235-10 of the Northern district of California, in proceedings to consider dismissal for lack of prosecution.

The court of appeals panel equally detaches itself from enforcing published decisional Ninth Circuit case law and

Northern District of California Local Rules on those issues that were raised in Petitioner's opening brief and reply brief that conflict with the conclusions offered in the April 1 Memorandum and that are also dispositive of the central issues in Petitioner's appeal of the proceedingless July 16 Order ordering dismissal.

**(3) Certiorari should be granted, because an important question of the protection afforded under the Rule 37(d), FRCP, Deposition and Document Production Excusal Provision has not been clarified, as set forth in the 1970 Advisory Committee Notes, a proviso significantly effective in affording protection from the invasion of interests in privacy, meriting constitutional protection.**

This Court has in its most recently concluded term held that when a governmental entity has already illegally obtained private information that invades a person's right to privacy, it will fashion

a remedy to prevent a further invasion of that interest in privacy. Church of Scientology of California v. U.S., 506 U.S.___, 113 S.Ct. 447, 450, 121 L.Ed. 2d 313, 319 (1992).

Petitioner in his suspension of compliance with the proceedingless June 12 Order, pending the appeal thereof and reconsideration thereof, attempted to prevent *ab initio* the invasion of the privacy of his private and professional papers and effects from the threat to his privacy interests, meriting constitutional protection.

Prevention of that invasion is much preferred than an attempt to fashion a later remedy to limit the adverse effects of irreparable harm already implemented. Church of Scientology of California v. U.S., supra, 113 S.Ct.,at 450, 121 L.Ed. 2d, at 319.

— Petitioner was excused, under the Rule 37(d), FRCP, deposition excusal proviso, from attendance at and the production of documents at the May 26, 1992 and June 30, 1992 proposed depositions by serving on the defendant city attorneys Rule 26(c), FRCP, protective order motions objecting to the proceedings and notice thereof prior to those dates, respectively, after the defendant city attorneys in bad faith willfully failed to meet and confer with Petitioner, as required by Local Rule 230-4, about his objections to their discovery requests; Rule 37(d) (Excusal Proviso) and Rule 5(b), FRCP; Local Rule 230-4; Collins v. Wayland, 139 F.2d 677, 678 (9th Cir. 1944). See Proviso and Notes of Advisory Committee on 1970 Amendments to Rules, Rule 37(d), FRCP, at Appendix Pages A32-A33.

**(4) Certiorari should be granted, because the court of appeals panel in its April 1 Memorandum adversely decided Petitioner's appeal, based on misrepresentations of fact and law in Appellees' brief, and, in the process of so doing, denied Petitioner oral argument to correct those misrepresentations, after Petitioner informed the panel in requesting oral argument of those misrepresented statements of fact and law.**

In the panel's adverse disposition of Petitioner's appeal of the July 16 Order, the panel denied Petitioner his right to oral argument pursuant to Rule 34(a), FRAP, and 9th Circuit Rule 34-4. April 1 Memorandum, at Appendix Page A3. Nevertheless, the panel adversely disposed of Petitioner's appeal, based upon misrepresentations of fact and law in the appellees' brief.

Petitioner had informed the panel in his statement requesting oral argument (1) that the defendant-appellee members of the city attorney's office submitting the

appellees' brief had inherent and irreconcilable conflicts of interest between the personal interests of those members and the interests of the municipal entity and other co-defendant appellees they purported to represent and (2) that in the submission of their appellees' brief, those members of the city attorney's office inserted over forty-four (44) unsubstantiated assertions of alleged "fact" with no citation references to the records in violation of Rule 28(a)(4) and (e), FRAP, and 9th Circuit Rule 28-2.8.

## CONCLUSION

For the above reasons, a writ of certiorari should issue to review the July 16 Order.

Dated:

September 26, 1993

Respectfully submitted,

/s/ James Reyer

James Reyer, Esquire
Post Office Box 5876
Santa Rosa, CA

95402-5876

(707) 576-1244

Counsel to Petitioner

# APPENDIX

## MEMORANDUM AND ORDERS

**NOT FOR PUBLICATION**

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

APR 1 1993

CATHY A. CATTERSON, CLERK

U.S.COURT OF APPEALS

JAMES REYER, No. 92-16471
D.C. No.: CV-89-03839-BAC
Plaintiff-Appellant
vs. MEMORANDUM*

WILLIAM G.TODD, et al.; CITY OF SANTA ROSA; WILLARD LIEN SERVICE,

Defendants- Appellees.

---

Appeal from the United States District Court
for the Northern District of California
Barbara A. Caulfield, District Judge, Presiding

Submitted March 23, 1993**

Before: WALLACE, Chief Judge,
FARRIS and BRUNETTI, Circuit Judges.

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 34-4. Accordingly, we deny Reyer's request for oral argument.

James Reyer, an attorney, appeals pro se the district court's dismissal of Reyer's action for lack of prosecution and for failure to comply with discovery orders pursuant to Fed. R. Civ. P. 37 and 41. Reyer sought compensatory damages and injunctive relief in connection with the towing of his automobile. We have jurisdiction pursuant to 28 U.S.C. Section 1291. We review a district court's dismissal of an action under Rule 37 or 41 for abuse of discretion. Malone v. United States Postal Serv., 833 F.2d 128, 130 (9th Cir. 1987), cert. denied, 488 U.S.819 (1988). We affirm.

A district court may dismiss an action for a plaintiff's failure to prosecute, see Fed. R. Civ. P. 41(b), or as a sanction for a plaintiff's failure to comply with discovery, see Fed. R. Civ. P. 37(b). We will not disturb the district court's dismissal sanction unless we have "a definite and firm conviction that it was clearly outside the acceptable range of sanctions." Malone, 833 F.2d at 130. Nevertheless, where the district court imposes the "drastic sanction [] of dismissal . . ., the range of [the court's] discretion is narrowed and the losing party's non-compliance [with a court order] must be due to willfulness, fault, or bad faith." Fjelstad v. American Honda Motor Co., 762 F.2d 1334, 1337 (9th Cir. 1985) (quotations omitted). "'[D]isobedient conduct not shown to be outside the control of the litigant' is all that is required to

demonstrate willfulness, bad faith, or fault." Henry v. Gill Indus., Inc., 983 F.2d 943, 948 (9th Cir. 1993) (quoting Fjelstad, 762 F.2d at 1341).

"Because the sanction of dismissal is such a harsh penalty, the district court must weigh five factors before imposing dismissal: (1) the public's interest is expeditious resolution of litigation; (2) the court's need to manage its dockets; (3) the risk of prejudice to [defendants]; (4) the public policy favoring disposition of cases on their merits; and (5) the availability of less drastic sanctions." Porter v. Martinez, 941 F.2d 732, 733 (9th Cir. 1991) (quotations omitted). The court weighs the same five factors in determining whether to dismiss an action for lack of prosecution. See Carey v. King, 856 F.2d 1439, 1440 (9th Cir. 1988). "[T]he key factors are prejudice and availability of

lesser sanctions." Wanderer v. Johnson, 910 F.2d 652. 656 (9th Cir. 1990).

Here, the five factors support dismissal of Reyer's action. Reyer failed to appear at his deposition and to produce certain documents despite a district court order instructing him to do so. The order specifically warned Reyer that failure to comply would result in dismissal of his action "for lack of prosecution and cooperation with the Court." Thus, Reyer was aware of the consequences of failing to comply with the court's order. See Malone, 833 F.2d at 132 (warning satisfies district court's duty to explore less drastic sanctions). Further, Reyer's failure to comply with discovery orders prejudiced defendants. See Adriana Int'l Corp. v. Thoeren, 913 F.2d 1406, 1412 (9th Cir. 1990) ("[a] defendant suffers prejudice if the plaintiff's actions impair the

defendant's ability to go to trial"), cert. denied, 111 S.Ct. 1019 (1991). Moreover, the record shows repeated delays throughout the action. thus, the district court's need to manage its docket and the public's interest in expeditious resolution of litigation weigh in favor of dismissal. See Porter, 941 F.2d at 733; see also Carey, 856 F.2d at 1440. Under these circumstances, the district court did not abuse its discretion by dismissing Reyer's action. See Malone, 833 F.2d at 130.

We find no merit in Reyer's remaining arguments. First, Reyer's prior appeals in this action, which we dismissed for lack of jurisdiction, did not divest the district court of its jurisdiction over the action. Second, the district court did not abuse its discretion by consolidating Reyer's two actions. Accord Garber v. Randell, 477 F.2d 711, 714 (2d Cir. 1973) (consolidation

orders reviewed for abuse of discretion). Moreover, the district court's order instructing Reyer to appear for his deposition put Reyer on notice that the threatened dismissal would affect the consolidated action. Third, the district court has inherent power to dismiss an action sua sponte. Link v. Wabash R.R. Co., 370 U.S. 626, 630-31 (1962). Fourth, Reyer's arguments regarding Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxite de Guinee, 456 U.S. 694 (1982), are inapposite. Finally, Reyer has failed to support his allegation that the district court judge lacked independence and neutrality and has failed to establish any prejudice resulting from the alleged bias. We find no indication of impartiality on the party of the district court judge. Therefore, we reject Reyer's contention that his Fifth Amendment right to due

process was violated. See Robinson v. United States, 401 F.2d 248, 252 (9th Cir. 1968); see also United States v. Bennett, 702 F.2d 833, 836 (9th Cir. 1983) (judgment will be overturned only where judicial conduct was "clearly prejudicial").

AFFIRMED.

RENE AUGUSTE CHOUTEAU, City Attorney
THERESA L. CUNNINGHAM, Deputy City Attorney
City of Santa Rosa
100 Santa Rosa Avenue
P.O. Box 1678
Santa Rosa, California 95402
Telephone: (707) 524-5261

FILED
JUL 14 1992
RICHARD W.WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Attorneys for Defendant
City of Santa Rosa, et al.

RECEIVED
JUL 10 1992
B. A. C.

ENTERED IN CIVIL DOCKET JUL 16 1992

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

JAMES REYER,
Plaintiff,

vs.

WILLIAM G.TODD, et al.

Defendants.

Civil Action
No.: C 89-3839 BAC and
C 90-3372-BAC (Consolidated)

PROPOSED ORDER OF DISMISSAL

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On June 12, 1992, the Honorable Barbara A. Caulfield ordered that Plaintiff appear for his oral deposition in this case

on June 30, 1992, Plaintiff having refused to appear at a previously noticed deposition on May 26, 1992. Attached as Exhibit A is a true and correct copy of the May 26, 1992 deposition transcript. That order also provided that should Plaintiff fail to appear for this deposition, the case shall be dismissed for lack of prosecution and cooperation with the Court in following discovery orders and deadlines. Attached as Exhibit B is a copy of the June 12, 1992 order.

On June 30, 1992, Plaintiff failed to appear for his deposition as ordered by the Court. Attached as Exhibit C is a true and correct copy of the June 30, 1992 deposition transcript. GOOD CAUSE APPEARING, IT IS HEREBY ORDERED:

1. James Reyer vs. William G. Todd, et al., United States District Court Action Nos. C 89-3839-BAC and C 90-3372-BAC

(consolidated as C 89-3839-BAC) is dismissed as to all Defendants for lack of prosecution and cooperation with the Court in following discovery orders and deadlines.

2. Plaintiff's Motion to Vacate the June 12, 1992 Order and Enjoin and Stay All Discovery Against All Defendants is denied.

Dated: 7/13/92 /s/ Barbara A. Caulfield
JUDGE BARBARA A.CAULFIELD

RENE AUGUSTE CHOUTEAU, City Attorney
THERESA L. CUNNINGHAM, Deputy City Attorney
City of Santa Rosa
100 Santa Rosa Avenue
P.O. Box 1678
Santa Rosa, California 95402
Telephone: (707) 524-5261

FILED
June 12 1992
RICHARD W.WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Attorneys for Deferdant
City of Santa Rosa, et al.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

JAMES REYER, Civil Action No.: C 89-3839 BAC

Plaintiff,

vs.

ORDER RE DISCOVERY

WILLIAM G.TODD, et al.

Defendants.

---

On April 17, 1992, the Court requested that all discovery disputes be handled by telephone conference in this lawsuit. On May 27, 1992, Plaintiff and all parties

were sent copies of a discovery conference call scheduled by Judge Barbara A. Caulfield for Tuesday, June 2, 1992, at 2:00 p. m. On May 29, 1992, further notice was sent to Plaintiff regarding the June 2, 1992 conference call. On June 2, 1992, Defendant City of Santa Rosa, et al., twice attempted to contact Plaitiff at (707) 576-1244 to include Plaintiff in the telephone discovery conference, but Plaintiff could not be reached at that number. GOOD CAUSE APPEARING, IT IS HEREBY ORDERED:

1. Plaintiff's Motion for Protective Order and Order to Stay All Discovery Against All Defendants is denied.

2. Plaintiff shall appear for his oral deposition at the Santa Rosa Police Department, 965 Sonoma Avenue, Santa Rosa, California, on Tuesday, June 30, 1992 at 9:00 a.m. Said deposition shall continue from 9:00 a.m. to 12:00 p.m. and from 1:00

to 5:00 p.m. Plaintiff is further instructed to bring the documents described in Exhibit A of Defendant's Notice of Deposition and Request for Production of Documents previously served on Plaintiff on April 21, 1992.

3. Should Plaintiff fail to appear for his deposition, this case shall be dismissed for lack of prosecution and cooperation with the Court in following discovery orders and deadlines.

4. Discovery shall be cut off September 14, 1992.

5. Defendant's motions to dismiss/for summary judgment shall be heard on or before Friday, September 18, 1992.

Dated: 6/12/92 /s/ Barbara A. Caulfield
JUDGE BARBARA A.CAULFIELD

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

FILED
APR 15 1992
RICHARD W.WIEKING
CLERK, U.S. DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

JAMES REYER, Civil Action
No.: C 89-3839 BAC

Plaintiff,

vs. ORDER CONSOLIDATING
C-89-3839 and C-90-3372

WILLIAM G.TODD, et al.

Defendants.

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This matter comes before the court on defendants' Motion to Consolidate Civil Action Nos. C-89-3839 and C-90-3372. After a review of the briefs, the court finds it appropriate to submit the motion on the pleadings pursuant to Local Rule 220-1. both cases involve claims against the City of Santa Rosa and other defendants arising out of the towing of plaintiff's vehicle, and were deemed related by Judge Walker on December 19, 1990. The court finds that the cases involve common questions of law and fact and that consolidation is appropriate pursuant to Rule 42(a) of the Federal Rules of Civil Procedure.

Accordingly, the court hereby GRANTS defendants' motion to consolidate.
IT IS SO ORDERED.

Dated: 4/14/92 /s/Barbara A. Caulfield
Barbara A. Caulfield
United States District Judge

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

FILED
APR 17 1992
RICHARD W.WIEKING
CLERK, U.S. DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

JAMES REYER,

Plaintiff,

vs.

Case No. C 89-3839 BAC

ORDER FOR PRETRIAL PREPARATION

WILLIAM G.TODD, et al.

Defendants.

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Good cause appearing, it is hereby ORDERED pursuant to Fed. R. Civ. P. 16(e)

. . .

E. Status and Discovery Conferences. Any party desiring to confer with the court may (emphasis added), upon notice to all parties, arrange a conference through the courtroom deputy (Telephone (415) 556-2215) (sic) Conferences may be conducted by conference telephone call. The court encourages (emphasis added) the parties to

bring discovery disputes before the court in the first instance informally (emphasis added) by way of a conference. (L.R. 230-4(e); 285-3)

Dated:

/s/Barbara A. Caulfield
Barbara A. Caulfield
United States District Judge

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

June 28 1993

CATHY A. CATTERSON, CLERK

U.S.COURT OF APPEALS

JAMES REYER, No. 92-16471
D.C. No.: CV-89-03839-BAC
Plaintiff-Appellant
vs. ORDER

WILLIAM G.TODD, et al.; CITY OF SANTA ROSA; WILLARD LIEN SERVICE,

Defendants- Appellees.

---

Circuit Judges Wallace, Brunetti:

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

Nov 24 1992

CATHY A. CATTERSON, CLERK

U.S.COURT OF APPEALS

JAMES REYER,

Plaintiff-Appellant

vs.

WILLIAM G.TODD, et al.; CITY OF SANTA ROSA; WILLARD LIEN SERVICE,

Defendants- Appellees.

No. 92-15859
D.C. No.: CV-89-03839-BAC
CV-90-03372-BAC
ORDER

---

Circuit Judges Brunetti, Rymer, Kleinfeld

The petition for rehearing is denied. No further filings shall be accepted in this closed docket.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

Aug 26 1992

CATHY A. CATTERSON, CLERK

U.S.COURT OF APPEALS

JAMES REYER,

Plaintiff-Appellant

vs.

WILLIAM G.TODD, et al.; CITY OF SANTA ROSA; WILLARD LIEN SERVICE,

Defendants- Appellees.

No. 92-15859
D.C.#:CV-89-03839-BAC
CV-90-03372-BAC
Northern California
(San Francisco)

ORDER

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Before: BRUNETTI, RYMER and KLEINFELD, Circuit Judges

This court has reviewed appellant's response to the order to show cause. Because this appeal is taken from orders which are not final and appealable, this court lacks jurisdiction over the appeal. See 28 U.S.C. Section 1291. Accordingly, the appeal is dismissed. Appellant is informed that he may

file a new notice of appeal when a final judgment is entered.

MoCal 8/24/92/jh
6

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

OCT 16 1992

CATHY A. CATTERSON, CLERK

U.S.COURT OF APPEALS

JAMES REYER, No. 92-16166

D.C. #: CV-90-03372-BAC

Plaintiff-Appellant Northern California (San Francisco)

vs. ORDER

WILLIAM G.TODD, et al.; CITY OF SANTA ROSA; WILLARD LIEN SERVICE,

Defendants- Appellees.

---

Before: BEEZER, HALL and WIGGINS, Circuit Judges

Appellant has responded to the properly-issued August 25, 1992 order to show cause. The response fails to show how this court might have jurisdiction over his appeal

from a non-final discovery order. The appeal is dismissed. No further filings will be accepted in this closed appeal.

—

MoCal 10/13/92/jm
14

# APPENDIX

## CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULES

This case involves the Fifth Amendment to the Constitution of the United States, which provides in pertinent part as follows:

Amendment V

No person shall be . . . deprived of his life, liberty, and property, without due process of law, . . .

This case also involves Article III, Section 1, of the Constitution of the United States, which provides as follows:

Article III

Section. 1. The judicial power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior Courts, shall hold their Offices during their good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Additionally, this case involves 28 U.S.C., Section 1291, which provides as follows:

1291. Final Decisions of district courts.

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described om sections 1292(c) and (d) and 1295 of this title.

Rule 5(a) and (b), FRCP, in pertinent part provide:

(a) Service: When Required. ...every written motion other than one which may be heard ex parte and every written notice, appearance, demand, offer of judgment, designation of record on appeal, and similar paper shall be served upon each of the parties ... .

(b) Same: How Made. Whenever under these rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service upon the party is ordered by the court... .

Rule 7(b), FRCP, provides:

(b) Motions and Other Papers.
(1) An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing,shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.

(2) The rule applicable to captions and other matters of form of pleadings apply to all motions and other papers provided for by this rule.

(3) All motions shall be signed in accordance with Rule 11.
Rule 16(e), FRCP, provides:

"(e) Pretrial Orders. After any conference held pursuant to this rule, an order shall be entered reciting the action taken. This order shal control the subsequent course of the action unless modified by a subsequent order. The order following a final pretrial conference shall be modified only to prevent manifest injustice."

Rule 26(c), FRCP, provides:

**Rule 26. General Provisions Governing Discovery.**

. . .

**(c) Protective Orders.** Upon motion by a party or by the person from whom discovery is sought, and for good course shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one of more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and condition, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in apart, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

Rule 37(a), FRCP, provides:

(a) Motion for Order Compelling Discovery. A party, upon reasonable notice ro other parties, and all persons affected thereby, may apply for an order compelling discovery as follows:

(1) Appropriate Court. An application for an order to aparty may be made to the court in which the action is pending, or, on matters relating to a deposition, to the court in the district where the deposition is being taken. An application for an order to a deponent who is not a party shall be made to the court in the district where the deposition is being taken.

(2) Motion. If a deponent fails to answer a qwuestion propounded or submitted under rules 30 or 31, or a corporationor other entity fails to make a designation under Rule 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to

permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before applying for an order.

If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to Rule 26(c).

. . ."

**Rule 37(d), FRCP, Excusal Proviso provides:**

The failure to act as describe in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 26(c).

**Rule 37(d) Excusal Proviso: Notes of Advisory Committee on 1970 Amendments to Rules.**

. . . A provision is added to make clear that a party may not properly remain completely silent even when he regards a notice to take his disposition or a set of interrogatories or requests to inspect as improper and objectionable. If he desires not to appear or not to respond, he must apply for a protective order. The cases are divided on whether a protective order must be sought. Compare Collins v Wayland, 139 F2d 677 (9th Cir.1944), cert. den. 322 US 744; Bourgeois v El Paso Natural Gas Co. 20 FRD 358 (SDNY 1957); Loosley v Stone, 15 FRD 373 (SD Ill 1954), with Scarlatos v Kulukundis, 21 FRD 185 (SDNY); Ross v True Temper Corp. 11 FRD 307 (ND Ohio 1951) Compare also Rosenberg supra, 58 Col. L. Rev. 480, 496 (1958) with 2A Barron & Holtzoff, Federal Practice and Procedure 530-531 (Wright ed. 1961). The party from whom discovery is sought is afforded, though Rule 26(c), a fair and effective procedure whereby he can challenge the request made. At the same time, the total noncompliance with which Rule 37(d) is concerned may impose sever inconvenience or hardship on the discovering party and substantially delay the discovery process. Cf. 2B Barron & Holtzoff, Federal Practice and Procedure 306-307 (Wright ed. 1961) (response to a subpoena). . . .

Rule 41(b), FRCP, provides:

"(b) Involuntary Dismissal:Effect Thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of the court, a defendant may move for dismissal of an action or of any claim against the defendant. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of evidence, the defendant, without waiving the right to offer evidence in the event the motion is not granted, may move for dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier if the facts may then determine them and then render judgment against the plaintiff or may decline to render any judgment until the close of all evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

Northern District of California Local Rule 220-2 provides:

220-2. Notice and supporting papers. Except as otherwise ordered or permitted by the Judge, all motions, except those made in the course of a trial or hearing, shall be noticed in writing on the motion calendar of the assigned judge for hearing not less than 28 days after service. The noticed hearing date and time shall appear on the cover page of each motion, and of any opposition and reply, in the space opposite the caption below the file number. A public record of the date and time of each judge's motion calendar shall be maintained by the clerk and shall be published in an official newspaper of the court. Each notice of motion shall be accompanied by affidavits or declarations under penalty of perjury sufficient to support any material factual contentions, by an appropriate memorandum or brief and by a copy of a proposed form of order. Affidavits, declarations, and forms of orders shall not be physically attached to the notice or brief or memorandum and shall be separately captioned. Counsel shall have available at the hearing the original of any proposed form of order for signature by the Judge.

Northern District of California Local Rule 230 provides:

**Rule 230. Discovey Proceedings**

**230-4. Abuse of or failure to make discovery; sanctions.** (a) *Conference required.* The court will entertain no motion pursuant to Rules 26 through 37, Federal Rules of Civil Procedure, unless counsel shall have previously conferred concerning all disputed issues. If counsel for the moving party seeks to arrange such a conference and counsel for the party against whom the motion will be made willfully refuses or fails to confer, the judge (in the absence of a prior order dispensing for good cause with such a conference) may order the payment of reasonable expenses, including attorney's fees, pursuant to Rule 37(a)(4), Federal Rules of Civil Procedure and Local Rule 100-3.

(b) *Certificate of compliance.* At the time of filing any motion with respect to Rules 26 through 37, Federal Rules of Civil Procedure, counsel for the moving party shall serve and file a certificate of compliance with this Rule.

(c) *Protective Order.* Any party against whom a motion under Rule 37(a) or Rule 45(d)(1), Federal Rules of Civil Procedure, is being made may notice for hearing at the same time a motion for protective order under Rule 26(c).

(d) *Principles controlling disposition of motions.* In the disposition of any motion made under Rule 37(a) or 26(c), Federal Rules of Civil Procedure, the

court will be guided by the rule of construction contained in Local Rule 100-4 to secure the just, efficient and economical determination of every action and proceeding.

(e) *Premotion conference.* Counsel may request the courtroom deputy of the assigned judge to arrange a time for a chambers or telephone conference to resolve disputed discovery issues expeditiously and economically.

(f) *Declaration re expenses and fees.* Where a party, as a part of a motion or opposition to a motion, seeks an award of attorney's fees or other expenses pursuant to Rule 37, Federal Rules of Civil Procedure, and Local Rule 100-3, the motion or opposition shall be accompanied by a declaration itemizing with particularity the fees and expenses to which that party claims to be entitled.

Northern District of California Local Rule 235-10 provides:

"235-10. Dismissal for Lack of Prosecution. Each judge may from time to time notice for hearing on a dismissal calendar such actions or proceedings assigned to that judge which appear to him not to have been diligently prosecuted. Whenever it appears that plaintiff has failed to prosecute an action or to proceed diligently, the assigned judge may order it dismissed;

failure to serve the initial pleading within forty days of filing and, in the absence of an order of the assigned judge setting any date for any pretrial proceeding or for trial, failure by plaintiff to take action for four months shall be presumptive evidence of lack of prosecution. Unless otherwise ordered by the assigned judge, each party shall, not less than ten days prior to the noticed hearing date, serve and file a certificate setting forth the status of the action or proceeding and whether good cause exists to dismiss it for failure to prosecute. Nothing in this Rule shall preclude any party from filing a motion to dismiss an action or proceeding for failure to prosecute under Rule 41(b), Federal Rules of Civil Procedure."

Rule 8(a), FRAP, provides:

"(a) Stay Must Ordinarily be Sought in the First Instance in District Court; Motion for Stay in Court of Appeals. Application for a stay of the judgment or order of the district court pending appeal, or for approval of a supersedeas bond, or for an order suspending, modifying, restoring or granting an injunction during an appeal must ordinarily be made in the first instance in the district court. . . ."

Rule 28(a)(4) and (e), FRAP, provide:

"(a)

(4) A statement of the case. The statement shall first indicate briefly the nature of the case, the course of the proceedings, and its disposition in the court below. There shall follow a statement of the facts relevant to the issues presented for review, with appropriate references to the record (see subdivision (e)).

. . .

(e) References in the briefs to parts of the record reproduced in the appendix filed with the brief of the appellant (see Rule 30(a)) shall be to pages of the appendix at which those parts appear. If the appendix is prepared after the briefs are filed, references in the briefs to the record shall be made by one of the methods allowed by Rule 30(c). If the record is reproduced in accordance with the provisions of Rule 30(f), or if references are made in the brief to parts of the record not reproduced, the references whall be to pages of the parts of the record involved; e.g., Answer p. 7, Motion for Summary Judgment p. 2, Transcript p. 231. Intelligible abbreviations may be used. If reference is made to evidence the admissibility of which is in controversy, reference shall be made to the pages of the appendix or of the transcript at which the evidence was identified, offered, and received or rejected."

Rule 34(a), FRAP, provides:

"(a) In General; Local Rule. Oral argument shall be allowed in all cases unless pursuant to local rule a panel of three judges, after examination of the briefs and record, shall be unanimously of the opinion that oral argument is not needed. Any suich local rule shal provide any part with an opportunity to file a statement setting forth the reasons why oral argument should be heard. A general statement of th criteria employed in the administration of such local rule shall be published in or with the rule and such criteria shall conform substantially to the following minimum standard:

Oral argument will be allowed unless

(1) _ the appeal is frivolous;or

(2) the dispositive issue or set of issues has been recently authoritatively decided; or

(3) the facts and legal arguments are adequately presented in the briefs and record and the decisional process would not be significantly aided by the oral argumant."

Rule 35(b), FRAP, provides:

"(b) Suggestion of a Party for Hearing or Rehearing In Banc. A party may suggest the appropriateness for a hearing or rehearing in banc. No response shall be filed unless the court shall so order. The clerk shall transmit any such suggestion to the members of the panel and the judges of the court who are in regular active service but a vote need not be taken to determine whether the cause shall be heard or reheard in banc unless a judge in regular active service or a judge who was a member of the panel that rendered a decision sought to be reheard requests a vote on such a suggestion made by a party."

Rule 40(a), FRAP, provides:

"(a) Time for Filing; Content: Answer: Action by Court if Granted. A petition for rehearing may be filed within 14 days after entry pf judgment unless the time is shortened or enlarged by order or by local rule. . . ."

9th Circuit Rule 28-2.8 Record references.

Every assertion in briefs regarding matters in the record shall be supported by a reference to the page or document number of the original record where the matter relied on is to be found.

9th Circuit Rule 34-4. Classes of Cases to Be Submitted Without Oral Argument.

Pursuant to FRAP 34(a), ther is hereby established a class of cases to be submitted without oral argument. There may be placed in this class any appeal, petition for original writ, or petition for review or enforcement of an administrative order in which a 3-judge panel of this court is of the unanimous opinion that:

(1) the appeal is frivolous;or

(2) the dispositive issue or set of issues has been recently authoritatively decided; or

(3) the facts and legal arguments are adequately presented in the briefs and record and the decisional process would not be significantly aided by the oral argumant. Oral argument will be allowed in each case absent a specific finding pursuant to this rule that oral argument is not needed. When a case has been classified by this court for submission without oral argument, the Clerk shall give the parties 10 days from the date of the Clerk's letter in which to file a statement setting forth the reasons why, in the opinion of the parties, oral argument should be heard.